Nos. 22,753 and 22,811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Respondent.

On Petition for Enforcement and on Petition to Review and Set Aside an Order of the National Labor Relations Board.

Reply Brief for the Deutsch Company, Electronic Components Division.

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ARGUMENT.

I.

Substantial Evidence on the Record as a Whole Shows That the Deutsch Company Lawfully Regulated Distribution of Union Literature With the Minimal Restraint Required by the Circumstances.

The Board argues that there is substantial evidence to support its finding that the Deutsch Company unlawfully prohibited solicitation or distribution on behalf of the union anywhere on the plant premises at any time,

without justification. However, the Board's finding as to the scope of the Deutsch Company's regulation, both as to the area of the Deutsch Company's plant and the organizational activities covered, as well as the Board's finding as to the alleged lack of justification for the regulation, is without support of substantial evidence on the record as a whole. Additionally, the Board failed to apply the appropriate legal standards to determine the lawfulness of the limited regulation in fact carried out by the Deutsch Company.

A. Scope of Activities Regulated.

The Deutsch Company did not regulate any organizational activity other than distribution of literature. There was no regulation of discussions or any other organizational activities engaged in on behalf of the union during non-working time. The rule published in the Deutsch Company's Welcome Manual was in its apparent scope broader than the regulation in fact exercised over union organizational activity. Because of the ostensible scope of the published rule, the Board's Complaint alleged that the Deutsch Company had promulgated an unlawfully broad "no solicitation" rule. However, the Deutsch Company's objection that any claim of an unfair labor practice based upon the mere promulgation of the published rule was barred by the six month limitation period of Section 10(b) of the Act was recognized and the allegation stricken from the Complaint [Tr. 6, 58-59]. There is no evidence that subsequent to the date of promulgation of the published rule, the Deutsch Company ever enforced the published rule, or any other rule as to union organizational activity, other than to regulate distribution of literature within the security area.

B. Territorial Scope of Regulation.

The limited regulation in fact exercised by the Deutsch Company over distribution of literature did not apply to all company owned property; only company property within the security area was affected. Employees were free to, and did engage in distribution activities at entrances to company property and on company property at entrances to the security area. While at one period of time some employees were erroneously cautioned about distribution activities in these permitted areas, such errors were quickly corrected by management and no employee suffered any discrimination by reason of such activities. The Board expressly found that such regulation as was exercised, was applicable only to activity in the security area and that the Deutsch Company's employees understood the true territorial scope of such regulation [TXD 7].

C. Justification for the Limited Regulation in Fact Exercised.

The Board refers to a few specific examples of difficulties the Deutsch Company contends would exist if it were not permitted to continue the limited regulation exercised by it, and concludes that they are insufficient to justify the regulation. However, the Board has failed to consider the full extent of the problem presented to the Deutsch Company if the proposed organizational activity is allowed in the security area. The Deutsch Company enforces security standards to maintain the secrecy of its product development, prevent theft, safeguard its classified materials and to protect its property and employees. The problems created by the proposed organizational activity arise because distribution of union literature within the security area is

fundamentally incompatible with the Deutsch Company's maintenance of its required standards of security. It is impossible for the Deutsch Company to maintain its security control when numbers of people bring into the security area and distribute large amounts of materials, with the crowding, congestion and disruption in routine, orderly company procedures which must inevitably accompany such activities. Congestion at the gates, difficulty in seeing if appropriate badges are possessed, mingling in areas where people normally do not belong, increased problems in controlling materials being brought into and leaving the security area and problems arising from applying normal security procedures to people possessing union materials are not all, but only some of the problems the Deutsch Company seeks to avoid by its regulation of union distribution activities in the security area. Because of the fundamental conflict between the proposed organizational activity and maintenance of the desired level of security in the security area, the Deutsch Company enforced the regulation in issue in the security area. Because of this irreconcilable conflict, the Board erred in finding that the Deutsch Company's regulation was not justified, even without consideration of the limited scope of regulation and the alternative means to carry on distribution activities available to the union, hereinafter argued.

D. The Board Failed to Apply the Appropriate Legal Standards to Determine the Lawfulness of the Deutsch Company's Limited Regulation.

The Board argues that the regulation exercised by the Deutsch Company is invalid because it prohibited organizational activity on company property during non-working time. But as shown, the Deutsch Com-

pany did not regulate anything other than one limited form of organizational activity, distribution of literature, and that only on a designated part of company property. The Board's erroneous finding as to the extent of the regulation resulted in the Board failing to consider the fact that the Deutsch Company's regulation was greatly limited in scope, in determining whether circumstances existed to justify the Deutsch Company in exercising its limited regulation.

Where regulation of distribution activities is limited in scope, less compelling circumstances need be established to justify such regulation than would be necessary to validate a total proscription of organizational activity on company property. *Korn Industries v. NLRB,* 389 F. 2d 117 (4th Cir. 1967). In *Korn Industries* the court recognized that in regulating the competing desires of the employer to control the uses to be made of its property and of the employee to be free to engage in organizational activities, there must be a weighing of the competing interests. There, the court held that since the employer's regulation only affected a part of its property and alternative means of carrying on organizational activity were available, the employer's regulation, growing out of a desire to protect its property, would be recognized.

The approach of weighing the reasons for the regulation against its effect on organizational activity has long been recognized by the courts. Thus in *Republic Aviation Corporation v. National Labor Relations Board,* 324 U.S. 793, which established the presumptive invalidity of a total ban of organizational activities on company property, the court stated that the issue involved "working out an adjustment between the undis-

puted right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-798. As the court stated, "Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U.S. at 798.

Since resolution of the issue of whether the right to engage in organizational activity on company property should exist at all involved weighing of the competing interests of the employer and employee, it seems only fair and logical that in resolving conflicts between these interests in a particular situation, it is implicitly necessary to weigh on the one hand, the degree to which the employer's operations require it to enforce certain regulations with regard to the use of its property and, on the other hand, the effect of any such regulation on the exercise of the employee's organizational rights. And when the necessity for the Deutsch Company's regulation and its limited scope are weighed against its negligible effect on union organizational activities, the regulation should be found to be justified.

In addition to not considering the fact that the Deutsch Company's regulation was limited in scope, the Board refused to take into account the presence of adequate alternative means of distribution in determining if the Deutsch Company's regulation was justified. As the Board points out, the circuits have differed on whether the General Counsel must establish a lack of alternative means of carrying on organization-

al activity as a part of its case that the employer's regulation is invalid. Since, as pointed out above, the development and application of the rules relating to the use of an employer's property for organizational activity involved weighing the competing interests of the employer and employees, the proper rule is, as *NLRB v. Rockwell Mfg. Co.,* 271 F. 2d 109 holds, that the presence or absence of satisfactory alternative means of communication must be considered in first determining whether the employer's regulation is justified under all of the circumstances of the case.

Some of the circuits have merely ruled that the General Counsel need not show the presence or absence of such other means of distribution as a part of establishing his case. But here, the Deutsch Company has affirmatively established the presence of adequate alternative means for distribution. Not only was it shown that such means existed and could be exercised on company property, but it was proven that union organizers had voluntarily and successfully used these means both prior to the Deutsch Company's enforcement of its regulation and, without hindrance or evidence of any diminished effectiveness, after the Deutsch Company enforced its regulation. Nevertheless, the Board refused to consider the evidence of such alternatives in determining whether the Deutsch Company's minimal regulation was valid.

In view of the fact that only one type of organizational activity was regulated at all, and that only on a part of the Deutsch Company's property, and the further fact that satisfactory alternative means for distribution are available, when the nominal infringement on organizational activity resulting from the Deutsch Com-

pany's regulation is weighed against the logical and imperative business necessity for such regulation, the regulation must be held to be justified and valid under all of the circumstances.

II.

The Deutsch Company Lawfully Advised Its Employees of Their Right to and the Method by Which They Could Terminate Any Authorization Card Outstanding in Their Name.

The Deutsch Company mailed a letter to its employees which advised them that the Deutsch Company had learned that some employees had been tricked or deceived into signing authorization cards. The letter then informed them that if they had executed a card for either of the foregoing reasons they could revoke the card. Incidental to sending the letter, and as a part of informing its employees of the way in which they could revoke their authorization card in the event any of the foregoing circumstances existed, the Deutsch Company enclosed a post card with the letter. The post card was addressed to the Board's regional office and simply stated the senders desire to revoke his outstanding authorization card. The Board properly concluded that the letter was an expression of opinion protected by Section 8(c) of the Act. Since the post card was mailed with the letter and was merely an incidental means of assisting the Deutsch Company in expressing its position, the mailing of the card should be entitled to the same protection as the sending of the letter.

Even in the position it takes, the Board acknowledges that the post cards did not restrain or coerce the Deutsch Company's employees within the meaning of Section

8(a)(1) of the Act. However, the Board concludes that the cards do interfere with the Deutsch Company's employee's rights within the meaning of the Act.

No categorical definition of what is interference within the meaning of Section 8(a)(1) can be made. But an examination of the cases relied upon by the Board clearly indicates the kind of conduct intended to be proscribed.

In *NLRB v. Link-Belt Co.,* 311 U.S. 584 the Supreme Court stated that there was interference within the meaning of the Act when there was: "the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." 311 U.S. at 588. In *Link-Belt* the court found that there was interference by the employer because of its favoritism and assistance to one of the two competing unions seeking to organize the company's employees.

In its brief the Board states that interference exists when: "the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

The facts in the cases cited by the Board fill out these definitions of interference.

In *NLRB v. Ford Bros.,* 170 F. 2d 735 the court sustained findings of interference and coercion because of the employer's discharge of a known union adherent, allegedly for violation of a rule never previously announced or enforced, as well as because of threats of discrimination against union members, attempts to

deal individually with employees and threats to discharge union adherents.

Similarly in *Hendrix Mfg. Co. v. NLRB,* 321 F. 2d 100 supervisors warned employees that if the union were to win, bonuses, pensions and holiday pay would be curtailed and as a part of these acts, urged employees to solicit anti-union votes from other employees.

And in *Melville Confections, Inc. v. NLRB,* 327 F. 2d 689 a finding of interference, coercion and restraint was sustained because the employer conditioned the right to membership in its profit sharing plan to non-membership in a union.

In Local 542, *Operating Engineers v. NLRB,* 328 F. 2d 850 the union was found to have violated Section 8(b)(1) by threatening bodily injury and damage to property in an attempt to gain support of other employees during a strike.

Also in *NLRB v. Illinois Tool Works,* 153 F. 2d 811 the court supported the Board's finding of interference, restraint and coercion growing out of the employer's questioning its employees about the extent of their and other employees' union activity, refusing to deal with representatives of the employees, and enforcing an unlawfully broad, unjustified rule against solicitation on company property.

In *NLRB v. Syracuse Color Press,* 209 F. 2d 596 the court refused to sustain the Board's finding of interference, restraint and coercion arising solely out of the employer's interrogating its employees as to the scope of their union activity. Instead, the Board's order was sustained because the court found that in fact, the interrogation was carried out in a coercive atmosphere.

Finally, in *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21 the Court held that Section 8(a)(1) is violated by an employer's good faith discharge of an employee for alleged misconduct arising out of a protected activity, when the misconduct in fact never occurred. The Court stated that a contrary ruling would result in the loss of immunity for protected activity.

In each of the foregoing cases, although many did not rest their decision solely on "interference", there was inherent in the conduct held unlawful, some actual or potential threat of preventing employees from exercising their own free choice of representatives. Thus, in the context of employer action advising employees of their right to revoke their authorization cards, there must be something in the employer's conduct which at least threatens to deny the employee his free choice, before the employer's conduct can be found to be interference within the meaning of Section 8(a)(1) of the Act. The authorities cited by the Board relating to employer action to encourage their employees to withdraw from the union support this position.

In *NLRB v. Birmingham Publishing Co.*, 262 F. 2d 2 the employer's attempt to have its employees withdraw from a union was held unlawful because a supervisor personally passed around a decertification petition and promised salary raises and other benefits to employees who signed the petition.

Similarly in *NLRB v. V. C. Britton*, 352 F. 2d 797 the court held unlawful the company's attempt to encourage its employees to sign a petition to repudiate the union, because, among other things, the employees were told the company would close down and discharge its employees if the union won.

In *NLRB v. Elias Bros. Big Boy, Inc.,* 327 F. 2d 421 the employer interrogated employees with regard to the extent of their union activities and personally attempted to get them to sign letters withdrawing from the union.

Finally in *NLRB v. Movie Star, Inc.,* 361 F. 2d 346 the employer sought to induce employees to withdraw from the union by furnishing them facilities to procure signatures and sought to induce them to sign by engaging in systematic threats to close the plant and to discharge employees who remained members of the union, if the union was not withdrawn.

The Board's brief recognizes that it is interference with the employees' free choice that is condemned by Section 8(a)(1), when they state: "It is a recognized form of unlawful interference 'for an employer to . . . *induce* employees to sign . . . any form of union repudiating document . . .' " (Emphasis added). Even the Board decisions cited involve circumstances which effectively deprived the employees of their free choice. Thus, in *Murray Envelope Corp.,* 130 NLRB 1574 the employer handed employees cards announcing their withdrawal from the union, or that they were happy that they had never joined, and instructed them to sign and return the cards. Also in *Lakeland Cement Co.,* 130 NLRB 1365 the employer encouraged and assisted an employee to personally contact, on company time, other employees and obtain their withdrawal from the union. And in *F. C. Huyck & Sons,* 125 NLRB 271 the employer informed its employees that they could come to him and he would assist them in withdrawing from the union.

Thus, in all of the cases relied on by the Board the employer performed acts which clearly coerced and tend-

ed to deprive the employees of their freedom of choice as to whether or not to sign. No such facts are present here. The Board expressly found that the letter accompanying the post cards, which advised the employees of their rights, was privileged and not unlawful. The only added ingredient was the presence of the post cards. The writing on the post cards was certainly innocuous. Nothing related to the mailing of the post cards, or their disposition could in any way deprive employees of their free choice of action with respect to the post cards or their authorization cards. The Board's apparent position that the mere furnishing of the post cards, in itself, is unlawful interference, even though it does not interfere with the employees' free choice, is unsupported by any authority and as indicated, has been rejected by the courts, as in *NLRB v. Syracuse Color Press,* 209 F. 2d 596.

While the Board may believe that the employer's act of presenting information to its employees is made more effective by enclosing the post card, it cannot, merely because it is more effective, declare the conduct illegal. This approach by the Board has also been rejected. Thus, in *Southwire Co. v. NLRB,* 383 F. 2d 235 the court refused to enforce the Board's finding that the employer's showing of the motion picture "And Women Must Weep" was a violation of Section 8(a)(1). Although decided under Section 8(c) rather than 8(a)(1), the following statement of the court is highly relevant here: "It is true that the film is highly emotional and that its impact against unions is probably strong but we do not believe that free speech is limited to non-emotional or non-impact speech." Just as in *Southwire,* so here, the Deutsch Company's conduct in furnishing

its employees with post cards does not interfere with their freedom to select a bargaining agent and cannot therefore be a violation of the Act.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the court should refuse to enforce the Board's order.

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